Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
NCTA Petitions Regarding	)	WC Docket No. 11-118
Section 652 of the	)	
Communications Act	)	

COMMENTS OF
THE NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES
AND
THE NEW JERSEY DIVISION OF RATE COUNSEL

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SUMMARY

The National Association of State Utility Consumer Advocates and the New Jersey Division of Rate Counsel (collectively, "Consumer Advocates") recommend that the Federal Communications Commission ("FCC") reject the Petition for Declaratory Ruling and the separate but related Conditional Petition for Forbearance that the National Cable & Telecommunications Association ("NCTA") filed on June 21, 2011. NCTA has failed to meet its burden of proof that the approval of either of the two petitions would be in the public interest.

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I. INTRODUCTION

The National Association of State Utility Consumer Advocates ("NASUCA") as an organization[1] and the New Jersey Division of Rate Counsel ("Rate Counsel") as an agency representing New Jersey consumers and as a member of NASUCA[2] (collectively, "Consumer Advocates") hereby submit comments in response to the Notice of the Federal Communications

[1]/ NASUCA is a voluntary association of advocate offices in more than 40 states and the District of Columbia, incorporated in Florida as a non-profit corporation. NASUCA's members are designated by laws of their respective jurisdictions to represent the interests of utility consumers before state and federal regulators and in the courts. Members operate independently from state utility commissions as advocates primarily for residential ratepayers. Some NASUCA member offices are separately established advocate organizations while others are divisions of larger state agencies (e.g., the state Attorney General's office). NASUCA's associate and affiliate members also serve utility consumers but are not created by state law or do not have statewide authority.

[2]/ Rate Counsel is an independent New Jersey State agency that represents and protects the interests of all utility consumers, including residential, business, commercial, and industrial entities. The Rate Counsel, formerly known as the New Jersey Ratepayer Advocate, is in, but not of, the Department of Treasury. *N.J.S.A.* §§ 52:27EE-46 *et seq.*

Commission ("FCC" or "Commission")[3] seeking comments on the Petition for Declaratory Ruling and the Conditional Petition for Forbearance that the National Cable and Telecommunications Association ("NCTA") filed on June 21, 2011.[4]

II. PETITIONS

A. Overview

NCTA submitted two separate but related petitions to the FCC regarding the application of Section 652 of the Communications Act of 1934 ("Act"), as amended, to transactions between cable operators and competitive local exchange carriers ("CLEC"). The first petition seeks a declaratory ruling that Section 652 of the Act does not apply to CLEC-cable operator transactions.[5] The second conditional petition requests that if the FCC denies the Petition for Declaratory Ruling, the FCC then forbear from enforcing Section 652 of the Act to mergers, acquisitions, and other transactions between cable operators and CLECs (specifically those that did not provide local exchange services as of January 1, 1993).[6]

B. Petition for Declaratory Ruling

Section 652 imposes cross-ownership restrictions on cable operators and LECs unless the parties obtain a waiver from the FCC and also obtain the approval of each local franchising

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3/ DA 11-1177, "Comment Sought on NCTA Petitions Regarding Section 652 of the Communications Act," WC Docket No. WC 11-118, "Pleading Cycle Established," July 8, 2011.

4/ Petition for Declaratory Ruling To Clarify 47 U.S.C. § 572 in the Context of Transactions Between Competitive Local Exchange Carriers and Cable Operators, WC Docket No. 11-118 , filed June 21, 2011, ("NCTA Petition for Declaratory Ruling"); Conditional Petition for Forbearance from Section 652 of the Communications Act for Transactions Between Competitive Local Exchange Carriers and Cable Operators, WC Docket No. 11-118, filed June 21, 2011 ("Petition for Forbearance").

5/ Petition for Declaratory Ruling, at 1.

6/ Petition for Forbearance, at 1.

authority ("LFA").[7] NCTA asserts that Congress intended to prevent two dominant providers (incumbent local exchange carriers ("ILEC") and cable operators) from merging or acquiring such interests that a "single company would control both wires to a customer's home or office," and that "[t]ransactions between cable operators and *competitive* LECs do not implicate these concerns."[8] According to NCTA: "Applying Section 652(b) expansively to bar a cable operator's acquisition of a CLEC would not only be at odds with the statute's structure and history, it would also counterproductively hold up plainly pro-competitive transactions."[9]

NCTA further asserts that the FCC has introduced uncertainty about the reach of Section 652,[10] which, according to NCTA, "is exacerbated by a waiver process that allows LFAs to hold up even pro-competitive transactions for any reason – or for no reason at all – on a timetable of their own choosing."[11] According to NCTA, removing the Section 652 "barrier" would enable CLECs, many of which "are struggling to raise capital," to combine with cable companies, and then more effectively challenge ILECs in serving business customers.[12]

If the FCC denies the petition for declaratory ruling, NCTA then requests that the Commission forbear from enforcing Section 652 as it applies to CLEC-cable transactions, or, at a minimum, forbear from enforcing the LFA approval process. NCTA also requests that if the

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7 / Petition for Declaratory Ruling, at 2, citing 47 U.S.C. §572(d)(6)(B)/

8 / Petition for Declaratory Ruling, at 2, emphasis in original. *See also, id.*, at 6-11.

9 / *Id.*, at 10.

10 / *Id.*, at 2-3 (discussing and citing *Applications Filed for the Acquisition of Certain Assets of CIMCO Communications, Inc. by Comcast Phone LLC, Comcast Phone of Michigan, LLC and Comcast Business Communications,* Memorandum Opinion and Order and Order on Reconsideration, 25 FCC Rcd 3401, para. 13, n. 34 (2010)); *see also,* Petition for Declaratory Ruling, at 11-13 (discussing and citing *SouthEast Telephone, Ltd.*, Order, 12 FCC Rcd 2561, para. 7 (CSB 1996).

11 / Petition for Declaratory Ruling, at 3.

12 / *Id.*, at 4.

FCC decides not to approve any of these requests, the FCC "establish substantive standards and time limits to facilitate expeditious consideration of waiver requests, including standards that apply to LFAs."[13]

C. Petition for Forbearance

If the FCC does not grant NCTA's Petition for Declaratory Ruling, NCTA then requests that the FCC grant its petition for forbearance from enforcing Section 652 of the Act to mergers, acquisitions and other transactions between cable companies and CLECs.[14] Many of the arguments in its Petition for Forbearance are the same as those in its Petition for Declaratory Ruling. For example, in NCTA's view, these transactions are "inherently pro-competitive"[15] and similar to its position in it Petition for Declaratory Ruling, NCTA contends that the "text, purpose, and history of Section 652" suggest that the intention of the statute was to address transactions between two incumbent companies and not to address transactions between cable companies and CLECs.[16] Also, NCTA laments that the Commission, in its recent review of a proposed transaction between Comcast and CIMCO (a Chicago-based CLEC) "declined to address whether Section 652 applies to CLEC-cable transactions in which the CLEC was not providing service as of January 1, 1993."[17]

As the following section demonstrates, although NCTA asserts that its Petition for Forbearance satisfies the three-part test set forth in Section 10(a) of the Act, NCTA has failed to demonstrate that it has met the three-part test.

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13 / *Id.*

14 / Petition for Forbearance, at 1.

15 / *Id.*, at 2.

16 / *Id.*, at 3.

17 / *Id.*, at 3, cite omitted.

D. Discussion and Analysis of Two Petitions

NCTA has not demonstrated that approval of either of its petitions would be in the public interest. Consumer Advocates are not persuaded that the CLEC-cable transactions discussed by NCTA are necessarily "pro-competitive." Although NCTA depicts the transactions as entailing two non-dominant telecommunications carriers, cable companies have emerged as powerful suppliers of triple-play telecommunications service. At stake then, are transactions between CLECs and cable companies (which, with the ILECs, constitute a duopoly). Furthermore, the cable companies' presence in telecommunications market is not as benign as NCTA's filings might suggest. Comcast Corporation, NCTA's largest member, recently purchased NBCU, and therefore is dominating not only its "traditional" cable markets and the rapidly growing VoIP market, but also the provision of content. Consumer Advocates are wary of yet further market concentration and of further acquisitions by cable companies. NCTA has failed to demonstrate that allowing cable companies to have unfettered ability to acquire CLECs would yield just, reasonable and non-discriminatory rates, nor has it demonstrated that its Petitions are in the public interest.

Furthermore, there is a fundamental question as to whether NCTA can invoke forbearance requests under Section 10A. Section 10A applies to telecommunications carriers, and, therefore it is not evident that cable operators may rely on Section 10A to seek forbearance from purchasing telecommunications carriers. In any event, even if the FCC were to determine that NCTA could invoke such a forbearance request, NCTA has failed to demonstrate that its Petition for Forbearance satisfies the three-prong test that Section 10 of the Act includes. In broad terms, the three-part test requires the Commission to address the following:

1. Is the regulation necessary to ensure that the rates for the relevant services are just and reasonable?
2. Is the enforcement of the regulation necessary to protect consumers?
3. Would forbearance from applying the regulation be consistent with the public interest?[18]

The Commission is obligated to forbear under section 10(a) only if all three elements of the forbearance criteria are satisfied. NCTA has failed to demonstrate that its Petition satisfies even on part of the three-part test. The standards established by Congress by which the Commission must evaluate forbearance petitions are high. Section 10's three-part test is conjunctive, *i.e.*, all of the criteria must be met. As the Commission has explained:

> The Commission is obligated to forbear under section 10(a) only if all three elements of the forbearance criteria are satisfied. Thus, the Commission "could properly deny a petition for forbearance if it finds that any one of the three prongs is unsatisfied."[19]

Further, the Commission must also follow the requirement of Section 10(b) that in making a determination of whether forbearance is in the public interest, the Commission "shall consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services."[20] Consumer Advocates acknowledge NCTA's view that its petition would facilitate cable companies' transactions with CLECs, thereby purportedly

[18]/ 47 U.S.C. § 160.

[19] / *In the Matter of Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. §160(c) in the Philadelphia, Pittsburgh, Boston, New York City, Providence and Virginia Beach Metropolitan Statistical Areas,* WC Docket No. 06-172, *Memorandum Opinion and Order*, FCC 07-212 (rel. December 5, 2007) ("*Verizon Six MSA Order*"), at para. 20, quoting *Cellular Telecommunications & Internet Assoc. v. Federal Communications Commission*, 330 F.3d 502, 509 (D.C. Cir. 2003). See also *Petition of Core Communications, Inc. for Forbearance from Sections 251(g) and 254(g) of the Communications Act and Implementing Rules*, WC Docket No. 06-100, Memorandum Opinion and Order, 22 FCC Rcd 14118, 14125, para. 12 (2007).

[20] / 47 U.S.C. §160(b).

enhancing their combined ability to compete with ILECs,[21] but Consumer Advocates are not persuaded that lessening regulatory review of cable companies would enable the FCC and LFAs to adequately protect consumers and that it would be in the public interest.

The FCC should reject both petitions. If the FCC is considering modifying the way in which it applies Section 652, it should do so through a rulemaking proceeding. Furthermore, continuing LFA approval ensures that transactions are subject to adequate oversight. Consumer Advocates do not, however, oppose the FCC taking steps to minimize regulatory uncertainty. Therefore, NCTA's request for substantive standards and time limits to guide review of waiver requests as well as LFA review is reasonable. As NCTA explains, although the statue provides guidance regarding the FCC's review of waiver requests it lacks substantive standards for LFAs' review of requests and lacks time limits for LFAs' review.[22] Such guidance could occur through an FCC rulemaking process.

III. CONCLUSION

Consumer Advocates recommend that the FCC reject the Petition for Declaratory Ruling and the Conditional Petition for Forbearance that NCTA submitted. NCTA has failed to demonstrate that either petition is in the public interest. Consumer Advocates, however, do not oppose FCC efforts to minimize regulatory ambiguity and to provide greater guidance to LFAs regarding the criteria and time tables by which they review proposed transactions.

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[21] / *See, e.g.*, Petition for Declaratory Ruling, at 13.

[22] / Petition for Declaratory Ruling, at 16. *See also, id.*, at 17-23 (discussing flaws in the present LFA review process).

Respectfully submitted,

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